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Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — PETITION NO 26NCC-42 OF 2011
MARY LIM J
18 JULY 2013

Civil Procedure — Orders — 'Liberty to apply' clause — Meaning of — Only relating to matters necessary to carry order into effect — Whether matters ruled by court to be excluded

Companies and Corporations — Member's rights — Oppression — Order made under s 181 of the Companies Act 1965 — Order containing 'liberty to apply' clause — Application to make representations on valuation report prepared by valuer — Whether application an attempt to impugn valuation report

On 27 March 2012, the court had granted, inter alia, the following orders in relation to this petition filed pursuant to s 181 of the Companies Act 1965 (i) that the second respondent buyout all the shares of the petitioner in the first respondent, at the price of those shares to be determined by an independent valuer; (ii) that the parties may make representations to the valuer as to the valuation; (iii) that the court will determine the final value of the shares and the terms of the buyout order; and (iv) that the parties be at liberty to apply. An independent valuer, Ferrier Hodgson MH Sdn Bhd ('FHMH') had since completed its valuation report and the parties were now before the court in respect of that valuation report. The petitioner applied to make representations on the valuation report prepared by FHMH. The petitioner, in support of its application, contended that (a) FHMH had ignored a higher valuation done by Hartanah Consultants (Valuation) Sdn Bhd; (b) FHMH had adopted a lower gross development value; (c) FHMH had not verified an apparent RM160m owing from the first respondent to the second respondent; and (d) the first and second respondents were communicating directly with FHMH on the materials required for the valuation and the petitioner was 'left out'. The second respondent's submitted that the petitioner's application was not about making representations but was really an attempt by the petitioner to impugn the valuation report prepared by a mutually agreed valuer. This was said to be entirely outside the terms of the order of court made on 27 March 2012 ('the order').

Held, dismissing the application with no order as to costs:

(1) Pursuant to the order, while parties were at liberty to apply to court after the valuation report had been filed, it was only on matters pertaining to

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the 'working out of the actual terms of the order'; and not on matters that the court had already ruled or ordered. This was regardless of which 'liberty to apply' term was invoked. Such term was only in respect of matters that were 'necessary to carry' the order into effect (see para 13).

(2) There was no justification for the court to go behind the valuation report or allow any further inquiries to be made as to the correctness or otherwise of such valuation (see para 16).

(3) The petitioner claimed to be making representations. However, in articulating its various representations or reasons, it was quite apparent that the petitioner was in fact challenging the valuer and the valuation. This was quite outside the ambit of the order (see para 18).

(4) The matters now raised by the petitioner had already been raised before FHMH. As evidenced from the valuation report, FHMH had duly taken account of those matters or representations of the petitioner (see para 19).

(5) Even if the court were to entertain the representations of the petitioner on the grounds offered, there were no grounds of merit or basis. The valuation report was fair and balanced having taken into consideration all matters raised by all parties (see para 21).

[Bahasa Malaysia summary

Pada 27 Mac 2012, mahkamah membenarkan, antara lain, perintah-perintah berikut berkaitan petisyen ini yang difailkan berikutan s 181 Akta Syarikat 1965; (i) bahawa responden kedua membeli kesemua saham pempetisyen dalam responden pertama, pada harga saham-saham yang akan ditentukan oleh penilai bebas; (ii) bahawa pihak-pihak boleh membuat representasi kepada penilai mengenai penilaian; (iii) bahawa mahkamah akan menentukan nilai muktamad saham-saham dan terma-terma perintah untuk membeli; dan (iv) bahawa kesemua pihak bebas untuk memohon. Penilai bebas, Ferrier Hodgson MH Sdn Bhd ('FHMH') telah selesai laporan penilaiannya dan pihak-pihak berada di hadapan mahkamah sekarang adalah berkaitan laporan penilaian. Pempetisyen memohon untuk membuat representasi atas laporan penilaian yang disediakan oleh FHMH. Pempetisyen, dalam menyokong permohonannya, berhujah bahawa: (a) FHMH telah tidak menghiraukan penilaian lebih tinggi yang dibuat oleh Hartanah Consultants (Valuation) Sdn Bhd; (b) FHMH telah menggunakan nilai pembangunan kasar yang lebih rendah; (c) FHMH tidak mengesahkan sejumlah RM160 juta yang jelas terhutang oleh responden pertama kepada responden kedua; dan (d) responden pertama dan kedua secara terus berkomunikasi dengan FHMH atas material yang diperlukan untuk penilaian dan pempetisyen tidak dimasukkan. Responden kedua berhujah bahawa permohonan pempetisyen bukan mengenai representasi tetapi sebenarnya percubaan oleh pempetisyen untuk mempersoalkan laporan penilaian yang disediakan oleh penilai yang

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dipersetujui bersama. Ini adalah secara keseluruhannya di luar terma-terma perintah mahkamah yang dibuat pada 27 Mac 2012 ('perintah'). A

Diputuskan, menolakpermohonan tanpa perintah terhadap kos:

(1) Berikutan perintah tersebut, sementara pihak-pihak bebas untuk memohon kepada mahkamah selepas laporan penilaian telah difailkan, hanya atas perkara-perkara berkaitan kepada 'working out of the actual terms of the order'; dan bukan atas perkara-perkara yang mahkamah telah perintahkan. Ini adalah tanpa menghiraukan terma 'liberty to apply' yang mana yang dibangkitkan. Terma sedemikian hanya berkaitan perkara yang mana 'necessary to carry' perintah untuk berkuat kuasa (lihat perenggan 13). B C

(2) Tidak terdapat justifikasi untuk mahkamah menyiasat laporan penilaian sedemikian atau membenarkan apa-apa siasatan lanjut dibuat terhadap ketepatan atau sebaliknya penilaian sedemikian (lihat perenggan 16). D

(3) Pempetisyen mendakwa membuat representasi. Walau bagaimanapun, dalam menyatakan pelbagai representasi atau sebabnya, adalah agak jelas bahawa pempetisyen sebenarnya mencabar penilai dan penilaian tersebut. Ini adalah agak di luar lingkungan perintah tersebut (lihat perenggan 18). E

(4) Perkara-perkara yang sekarang ini dibangkitkan oleh pempetisyen telah dibangkitkan di hadapan FHMH. Sebagai bukti daripada laporan penilaian, FHMH telah mengambil kira perkara-perkara tersebut atau representasi pempetisyen (lihat perenggan 19). F

(5) Walaupun mahkamah adalah untuk menilai representasi pempetisyen atas alasan-alasan yang ditawarkan, tidak terdapat alasan bermerit atau berasas. Laporan penilaian adalah adil dan seimbang setelah mengambil kira pertimbangan kesemua perkara yang dibangkitkan oleh kesemua pihak (lihat perenggan 21).] G

Notes

For cases on oppression, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 594–660. H

Cases referred to

Bird Precision Bellows Ltd, Re [1984] Ch 419, Ch D (refd)
Collier v Mason (1858) 25 Beav 200 (folld)
Coombs v Dynasty (1994) 14 ASCR 60, FC (refd) I
Cristel v Cristel [1951] 2 KB 725, CA (refd)
Edmund Charles Liebenberg v ICB-Griffin Manufacturing Sdn Bhd & Ors [2005] 5 MLJ 259; [2005] 3 CLJ 613, HC (refd)
Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food Processing Sdn Bhd

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& Ors [2011] 6 MLJ 585; [2011] 8 CLJ 141, CA (refd)
Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors (Part 2) [2008] MLJU 656, CA (refd)
Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2009] MLJU 339, CA (refd)
Irish Press plc v Ingersoll Irish Publications Limited [1995] 2 ILRM 270, SC (refd)
Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Ors [1975] 1 MLJ 134, FC (refd)
Weekes v Gallard (1869) 21 LT 655 (folld)
Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd & Ors and Another appeal [1999] 2 SLR 129, CA (refd)

Legislation referred to

Companies Act 1965 s 181, 181(2)
Companies Act 1994 (Cap 50) [SG] s 216(2)
Real Property Gains Tax Act 1976

Mark Ho (Jananee Gopal and Azad Akbar with him) (Chellam Wong) for the petitioner.
John Skelchy (Vishal Kumar with him) (James Monteiro) for the first respondent.
Malik Imtiaz (Yoong Nim Chor with him) (Yoong & Partners) for the second and third respondents.

Mary Lim J:

[1] On 27 March 2012, the court granted the following orders in relation to this petition filed pursuant to s 181 of the Companies Act 1965:

(a) that the second respondent shall buyout all the 4,500,000 shares of the petitioner in the first respondent, at the price of those shares to be determined by an independent valuer on a 'net tangible asset' basis, such valuation to be as at the date of this order;

(b) that the appointment of the independent valuer is to be mutually agreed by the petitioner and the second respondent and in the event these parties cannot agree to the independent valuer, either of those parties are at liberty to apply to court to appoint a valuer;

(c) that the valuation is to be done within three months from the date of this order and the parties may make representations to the valuer as to the valuation;

(d) that the valuer shall file the valuation report into court and the parties may apply;

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(e) that the court will determine the final value of the shares and the terms of the buyout order;

(f) that the costs of the valuation shall be borne and paid by the first respondent;

(g) that should the second respondent be unable to proceed with the buy out the petitioner shall be at liberty to apply;

(h) that the costs of this petition of RM50,000 which, includes all previous orders for costs in the cause, shall be paid by the second and third respondents to the petitioner;

(i) no order as to costs against the first respondent; and

(j) that parties shall be at liberty to apply.

[2] The independent valuer, Ferrier Hodgson MH Sdn Bhd has since completed and filed its valuation report. The parties are now before the court in respect of that valuation report, the applications being:

(a) encl 80: the petitioner's application to make representations on the valuation report dated 31 December 2012 prepared by Ferrier Hogson MH Sdn Bhd ('FHMH'). These representations extend to being allowed to file affidavits and call experts to court to testify;

(b) encl 82: the petitioner's application for interim payment; and

(c) encl 84: the second respondent's application to fix the price or final value of the 4.5million shares of the petitioner in the first respondent, and ancillary orders for buyout.

[3] At the outset, it was agreed that encl 82 will be heard after encls 80 and 84; these latter applications being heard together. The related affidavits and affidavits in reply can be found in encls 81, 85, 89, 91, 93 and 95. These affidavits are filed by the petitioner and the second respondent.

[4] From the terms of the applications and their related affidavits, it would appear that the petitioner is not saying for a moment that the second respondent's application is misplaced. After all, the buyout was the principal order of the court. What it in essence is saying is that before that order on the final value of the shares and the terms of the buyout is made, it wants an opportunity to make representations and call experts on the report and its contents. According to the petitioner, it ought to be allowed to make representations for various reasons which I shall summarise as follow.

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[5] First, there are express provisions in the court's order that parties be at liberty to apply. At least four such mentions. In any case, the court always retain the power to make further orders ancillary or in relation to the valuation report. It is also the petitioner's argument that representations ought to be allowed because FHMH prepared a draft valuation report which it invited the parties to comment. This was on 29 November 2012. The petitioner replied with its comments on 10 December 2012. Those comments pertain to a valuation on the land conducted by Henry Butcher Sdn Bhd. The petitioner specifically responded on this by offering a valuation done by Hartanah Consultants (Valuation) Sdn Bhd ('Hartanah'). As it turned out, Hartanah's valuation, though mentioned in the valuation report, was not adopted. The petitioner claims that there are no clear justifications as to why FHMH:

(a) has 'ignored' Hartanah's higher valuation in concluding the valuation of the 30% equity interest of the petitioner in the first respondent when there was a large difference in the valuation price done by Henry Butcher and Hartanah; that FHMH should have considered the acquisition of three pieces of adjoining land which were also valued by Henry Butcher and that the valuation by Henry Butcher at RM120 per sqft was an 'outlier' (outside the cluster);

(b) adopted a lower gross development value; and

(c) not verified an apparent RM160m owing from the first respondent to the second respondent.

[6] Further, the petitioner claims that the first and second respondents were communicating directly with FHMH on the materials required for the valuation. The petitioner was 'left out'. The petitioner claimed that its nominee to the board of directors of the first respondent, Yeoh Keng Tat ('Yeoh') was only allowed to sit in the board in July 2012. His first meeting was on 21 September 2012.

[7] At that meeting, there was a request from FHMH on the verification of the information and materials provided by the first respondent. The board resolved that such verification will not be provided. Meanwhile, Yeoh who had requested for a copy of the material and information provided to FHMH did not get such material and information till 24 September 2012. Upon perusal of the material, the petitioner claimed it was obvious that insufficient material had been provided for an adequate valuation. The petitioner suggested that this 'must be so that the valuation would be lower than appropriate'.

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[8] The petitioner further alleged that whilst FHMH was unwilling to disclose the valuation undertaken by Henry Butcher on the ground of confidentiality, it allowed the second respondent to deal directly with Henry Butcher. The petitioner claimed that 'at the very least the second respondent should have waited for Ferrier Hodgson's reply before taking it upon themselves to communicate directly with the valuer of the land on which the value of the shares in the first respondent is based, namely Henry Butcher. More so when it was made known to all parties by Ferrier Hodgson'.

[9] The petitioner submitted that it would be just and reasonable that all these issues or queries be answered by FHMH in order to come to a just and fair value of the shares. For this, expert input and knowledge are further required.

[10] In opposition, the crux of the second respondent's submissions is that the petitioner's application was not about making representations. It was really an attempt by the petitioner to impugn that single valuation report prepared by a mutually agreed valuer. This was entirely outside the terms of the order of court made on 27 March 2012.

[11] The second respondent proceeded to examine the terms of the order of court; the steps and timelines involved in the mutual appointment of FHMH, the independent valuer and its preparation of first a draft and then the valuation report; and both parties' representations to FHMH as to the valuation of the shares.

[12] Having examined all these matters, the second respondent submitted that the report before the court was fair, considered, balanced and had taken into account all presentations and representations of the parties. The parties, especially the petitioner had been given all latitude and there was no need for any verification to be conducted by this court. Further, it was submitted that it had not been shown how FHMH had 'got it wrong' whether in methodology, evidence or in any other regard.

[13] In my view, the second respondent is right. Pursuant to the order of court dated 27 March 2012, while parties are at liberty to apply to court after the valuation report has been filed, it is only on matters pertaining to the 'working out of the actual terms of the order'; and not on matters that the court has already ruled or ordered. This is regardless of which 'liberty to apply' term is now invoked and even where this term is repeatedly used in the order. Such term is only in respect of matters that are 'necessary to carry' the order of the court of 27 March 2012 into effect – *Cristel v Cristel* [1951] 2 KB 725 at p 730.

[14] There may be weaknesses in the report but even in such situations, the court of Appeal in *Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food*

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Processing Sdn Bhd & Ors [2011] 6 MLJ 585 at p 611; [2011] 8 CLJ 141 at p 171, opined that alone was 'insufficient to constitute actionable negligence in law' on the part of the accountants who prepared the report in that case; there must be shown 'manifest error in the valuation of the property as well as the shares in question resulting in the price not being a fair price as intended in the consent order'.

[15] Applying the test laid down by Sir John Romilly MR in *Collier v Mason* (1858) 25 Beav 200; 53 ER 613; and later Lord Romilly in *Weekes v Gallard* (1869) 21 LT 655; and adopted by the Federal court in *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Ors* [1975] 1 MLJ 134, the court must actually act on the valuation report:

> ... *unless there be proof of some mistake, or some improper motive*, I do not say a fraudulent one; as if the valuer had valued something not included, or *had valued it on a wholly erroneous principle, or had desired to injure one of the parties to the contract*; or even in the absence of any proof of any of one of these things, *if the price were so excessive or so small as only to be explainable by reference to some such cause;* in any one of these cases the court would refuse to act on the valuation. (Emphasis added.)

[16] In short, there is 'no justification for the court to go behind the valuation report or allow any further inquiries to be made as to the correctness or otherwise of such valuation'. A careful examination of the events in *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors (Part 2)* [2008] MLJU 656 will illustrate this. The parties were before the court of Appeal to deal with consequential orders following the appellant's successful appeal against an order that it be wound up; and its unsuccessful appeal against a Petition for relief under s 181 of the Companies Act 1965. After dealing with the matter of costs, the court of Appeal set about restoring the parties to status quo ante so that the ends of justice may be met. The court of Appeal was of the opinion that in order to do complete justice, one party will be ordered to purchase the other party's shares in UEG. The court then set out the 'mechanics of the purchase'. In other words, the valuation of the shares, how, who, the process, and the timelines involved in the purchase.

[17] And, in *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2009] MLJU 339, the parties were back in court again; this time after the valuation had been done. The valuer who had completed his valuation sought leave of the court to file his report out of time. After evaluating the reasons, the court allowed the application. As to UEM's request for extension of time to make representations which the valuer had rejected in the first place, the court found no reason to interfere with his exercise of discretion. Thereafter, the court accepted the valuation; and proceeded to give effect to and complete the order of compulsory purchase of the shares that it had ordered in the earlier proceedings by setting the purchase price of the shares. At all times, the court

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was dealing with the mechanics of the purchase and not hearing representations on the valuation or the valuer, whether on the methodology adopted or the conclusions arrived at. All that had already been addressed in the earlier proceedings.

[18] In this case, the petitioner claimed to be making representations. However, in articulating its various those representations or reasons, it is quite apparent that the petitioner is in fact challenging the valuer and the valuation. This is quite outside the ambit of the order and as pointed out, not even condoned by the court of Appeal in *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2009] MLJU 339.

[19] More significantly and of importance is the fact that the matters now raised by the petitioner have already been raised before FHMH. As evidenced from the valuation report, FHMH have duly taken account of those matters or representations of the petitioner. A perusal of the report readily confirms that FHMH had, inter alia, taken into account the 'written representations' of the petitioner and the second respondent as its 'sources of information' which it had then 'used to form our opinion on the fair valuation' (see para 1.3 at pp 8–9 of the report).

[20] In fact, when the petitioner's concerns today are put into its proper perspective, it appears that the petitioner is not suggesting that its representations have been disregarded. Rather, it suggests that there are 'no clear justifications' for FHMH to have come to the conclusions and valuation that it did. This is quite different from making representations; and certainly an entirely different exercise from that allowed under the terms of the order of 27 March 2012. This is clearly a challenge of the valuation.

[21] In any event, even if the court were to entertain the representations of the petitioner on the grounds offered, I do not find any of those grounds of merit or basis. Having very carefully scrutinised that valuation report, I agree that it is fair and balanced having taken into consideration all matters raised by all parties. As repeatedly pointed out, it was conducted in accordance with the terms of the order of court given on 27 March 2012. The valuation report is also structured, reasoned and comprehensive, with FHMH reminding itself of matters such as its scope or terms of reference; and it informs of its approach and methodology in establishing the value of the shares which is the subject of the order of court.

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[22] Before embarking on the actual valuation, FHMH acquainted itself with background information and the financial position of the first respondent. Such information included familiarising itself with the relevant joint development agreement and court actions. As for the valuation itself, FHMH's approach, as directed by the court, used the NTA approach. This is extremely critical as this was the specific order of court.

[23] According to the FHMH, this approach 'indicates the fair value of the business by adjusting the asset and liability on the subject company's balance sheet to its estimated market value'. This then involved, inter alia, ascertaining the market value of the land which formed the single largest asset of the first respondent; and the fair value of the joint development agreement. There is substantial information and details of how all this was done.

[24] In ascertaining the market value of the land, it cannot be denied that FHMH considered both valuations by Henry Butcher and Hartanah (see paras 4.1.1 and 4.1.2; and pp 25–32). The report explained FHMH's conclusions of the fair values for the land as at the cut-off date and of the first respondent – see paras 5.0 and 6.0. At para 5.1.1, FHMH specifically stated:

> Taking into consideration of BJD's 17% entitlement, we note that the valuation result from Hartanah Consultant's for the land value of RM220 per square feet would only be achievable if the GDV for the Development achieved higher than RM5.44 billion (which equivalent to approximately 120% increment in original GDV). Based on the market sentiment as at the Cut-Off-Date, GDV for the Land of RM5.44 billion appears to be optimistic.

[25] In the report, FHMH recognised that there was a subsequent event of a supplemental joint development agreement made on 3 July 2012; but this was disregarded. FHMH gave its reasons – because the order of court directed the valuation to be as at 27 March 2012.

[26] The above are but some salient features of the valuation conducted by FHMH that the court has highlighted to illustrate FHMH's clear appreciation of its object or terms of reference, its methodology and approach; and its conclusions. I cannot but agree with the second respondent that this valuation is balanced, fair and most crucially, it accords with and is in compliance of the order of court of 27 March 2012. There is no 'manifest error in the valuation of the property as well as the shares in question resulting in the price not being a fair price as intended' in the order of court of 27 March 2012. Therefore, the court accepts FHMH's valuation of the shares using the NTA approach as found in particular, at p 6 of its report.

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[27] The petitioner has further suggested that a premium must be added to the value ascertained by FHMH. This is because the transaction is not at arm's length between a willing buyer and a willing seller. This transaction or buyout was born out of an oppression petition where in order to do justice the court ordered a buyout. According to the petitioner, justice surely cannot be on the value of the shares alone but a premium imposed to reflect the court's disdain for the act of oppression on the minority. The petitioner relied on two decisions, *Edmund Charles Liebenberg v ICB-Griffin Manufacturing Sdn Bhd & Ors* [2005] 5 MLJ 259; [2005] 3 CLJ 613 and the decision of the court of Appeal of Singapore in *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd & Ors and Another appeal* [1999] 2 SLR 129.

[28] In *Edmund Charles*'s case, the High court added a premium to account for the oppression whereas in *Yeo Hung Khiang*'s case, the court of Appeal refused to disturb the High court's enhancement of the value of the shares in order to reflect the benefits and growth which have accrued to the company but for the oppressive acts; as well as the High court's refusal to impose interest as damages for the period prior to the order for purchase.

[29] Chao Hick Tin J at the High court had examined the ambit of s 216(2) (equivalent to s 181(2) of the Companies Act 1965) and the decisions of *Re Bird Precision Bellows Ltd* [1984] Ch 419 and *Irish Press plc v Ingersoll Irish Publications Limited* [1995] 2 ILRM 270 before concluding that this provision does not empower the court to grant damages as that would not be a relief 'with a view to bringing an end or remedying the matters complained of'. For that reason, His Lordship refused to impose interest payment on the period before the order to purchase was made and consequently made no such order for period up to date of judgment. However, in determining the fair value of the shares, His Lordship did not view it just to accept the valuation arrived at by the valuer without making an adjustment for the seven years 'when the petitioner was denied the benefit of his shareholding while the respondents seemingly plundered the company and siphoned off its profits to the respondent's other entities. To take no account of that would tantamount to sanctioning wrongdoings and rewarding the oppressor. That would be to turn justice on its head'– see p 134.

[30] The Court of Appeal did not find any reason to interfere in this adjustment although this was only given in 'extremely limited context'. This adjustment is to effect justice in the particular circumstances of individual cases and where the determination of the share value need not be in accordance with

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strict accounting principles. Citing the Australian decision of *Coombs v Dynasty* (1994) 14 ASCR 60, the court of Appeal opined at p 152 that 'At the end of the day, the court must fix a price that represents a fair value in all the circumstances of the case'.

[31] On this aspect, the second respondent argued that given there was no appeal against the order of the court made on 27 March 2012, this proposition of adding a premium to the price of the shares to reflect the oppression ought to be disregarded. If at all this proposition was to be considered, it should have been raised at the outset.

[32] Again, I must agree. If there is any argument to be made for such imposition or enhancement, it ought to have been made at the time when the petition was heard, and when addressing the reliefs sought. As the terms of the order did not extend to affixing this premium for this purpose, be it in the form of interest or any other component, this additional term is refused. In any case, I do not find the circumstances of this case (as explained and urged by the petitioner) such as to fall into this category of 'extremely limited cases' where a premium is warranted.

[33] In encl 84, the second respondent has proposed the following terms:

(a) that the second respondent shall buy the 4,500,000 shares in the first respondent (30% shares) held by the petitioner and the aggregate purchase price for the 30% shares shall be fixed at RM ... (purchase price);

(b) that the buyout of the 30% shares shall be completed no later than four months from the date of this order, on a business day in Kuala Lumpur and at an office address in Kuala Lumpur as notified with at least seven days prior written notice by the second respondent (or its solicitors) to the petitioner (or its solicitors);

(c) that the buyout of the 30% shares shall be completed as follows:

i the second respondent shall subject to the proviso below, pay the purchase price to the petitioner by way of banker's draft; and

ii the petitioner shall deliver to the second respondent a duly executed valid and proper instrument of transfer for the 30% shares as well as such other executed documents as may be necessary for revenue and stamp duty purposes.

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Provided that the second respondent shall deduct and retain from the purchase price and pay to the Director General of Inland Revenue the amount equal to 2% of the purchase price in respect of the purchase by the second respondent from the petitioner of the 30% shares pursuant to the Real Property Gains Tax Act 1976,

(d) that the petitioner procures that Mr Yeoh Keng Tat resigns as a director of the first respondent, such resignation to be effective on or before the date of completion of the purchase of the 30% shares.

[34] The court directed the parties to obtain instructions of their respective clients on these draft terms. The parties have exchanged views which are contained in their letters exchanged with each other and which have been copied to court. These letters have been identified and the parties have further refined some of those terms. The court has further heard parties on this.

[35] Following from the above, the application in encl 80 is therefore dismissed with no order as to costs. As for encl 84, having further heard parties and having taken into consideration further agreed terms, accordingly, it is ordered that:

(a) with regard the final price of the shares using the NTA approach as at 27 March 2012, it shall be fixed at RM7.99 per share with the aggregate purchase price of RM35.97m;

(b) this buyout shall be completed within four months from the date of this order on a business day in Kuala Lumpur and at an office address in Kuala Lumpur as notified with at least seven days' prior written notice by the second respondent (or its solicitors) to the petitioner (or its solicitors);

(c) the buyout shall be completed by paying RM35.97m to the petitioner by way of a bankers' draft and the petitioner shall deliver to the second respondent a duly executed valid and proper instrument of transfer for the 30% shares together with the corresponding share certificates for the 30% shares as well as such other executed documents as may be necessary for revenue and stamp duty purposes; and

(d) the petitioner procures that Mr Yeoh Keng Tat resigns as a director of the first respondent, such resignation to be effective on or before the date of completion of the purchase of the 30% shares.

[36] Lastly, by consent, such purchase price of RM35.97m shall carry interest at the rate of 5%pa from today to the date of completion. With these orders, the petitioner has withdrawn encl 82. Accordingly, that application is struck out with no order as to costs.

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Application dismissed with no order as to costs.

Reported by Kanesh Sundrum